SECTION 845 OTHER TRANSACTIONS for PROTOTYPES

Basic Authority – In November 1993, Congress authorized the three-year experimental authority for DARPA to conduct prototype projects directly relevant to weapons or weapons systems proposed to be acquired or developed. This authority was granted under Section 845 of the National Defense Authorization Act for FY 1994. A later amendment to Section 804 of the National Defense Authorization Act for FY 1997, extended this authority to the Military Departments and other DoD Components. Currently, this 845 authority is available through FY 2001.

Awards made pursuant to this authority are commonly referred to as "other transactions." *There are two types of commonly used "other transactions."*

(1) **Other Transaction for Research**- These types of OT's are authorized by the permanent 10 U.S.C. 2371 authority for basic, applied, and advanced research projects. A subset of these OTs is the Technology Investment Agreement. Guidance for use of other transactions for research or technology investment agreements can be found at http://alpha.lmi.org/dodgars.

(2) **Other Transactions for Prototype Projects** -A legally binding contractual instrument other than a procurement contract, grant, cooperative agreement, or other transaction for research, used for *prototype projects directly relevant to weapons or weapons systems proposed to be acquired or developed by the Department of Defense.*

Definition of 845 Prototype Projects

Although these Section 845 Prototype projects are directly linked to "weapons or weapons systems," the statute does not require that the prototype project be specifically for the development of a weapon. Rather, the statutory requirement states that the project be" directly relevant" to "weapons or weapon systems" proposed to be acquired or developed…." Thus, prototype projects under Section 845 may include sub-systems, components, technology demonstrations, and technologies of proposed DoD weapons systems. Furthermore, the language is broad enough to include training, simulation, auxiliary and support equipment " directly relevant" to "weapons or weapons systems."

Purpose of the Authority for Prototype OT's: Civil/Military Integration

- The goal of Section 845 is to (1) attract nontraditional contractors who are at the " cutting edge" of technology to conduct business with the government without changing their existing business practices, and (2) to break new ground with traditional defense contractors in doing business a new way.
- Section 845 allows DoD to experiment with immense government flexibility and innovation in structuring agreements and managing programs.
- OT's for prototype projects provide the flexibility to depart from procurement contracts imposed by statute or regulation and can help integrate the government and commercial industry. Other Transactions for Prototypes *are based on commercial practices and as such, are not required to comply with the FAR, DFARS, or those laws and regulations that are limited to procurement contracts, e.g. Truth in Negotiations Act and Cost Accounting Standards.*

- Section 845 projects provide avenues to:

  (a) eliminate overstated specifications leading to higher costs (b) involve the users up front in the acquisition process (c) couple development and operational testing to maximize use of prototypes before proceeding with full scale development, (d) make greater use of "off the shelf" components, systems, and services, (e) employ extensive informal competitions and , (f) use streamlined acquisition processes.

Source Selection For Section 845's : Sole Source or Competitive

To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out projects under Section 845.The requirement is not absolute, but obviously by using the term "maximum extent" Congress has made a strong policy statement in favor of competition. There should be a well-documented rationale for initiating Section 845 projects in the absence of competition. The DARPA library is a great source of information regarding trade journals, newsletters, and other scientific publications in which to advertise the solicitations for the 845 transactions. Although the Commerce Business Daily perhaps is not the best publication in which to attract commercial firms, it is a good traditional start for public dissemination of the solicitation.

845's: Defense or Dual Use

When considering the terms of the proposed 845 acquisition, one consideration is whether the project is for "defense use" or "dual use." Defense use in this context refers to defense unique systems and components with no commercial counterpart or application. If the acquisition is for "dual use", that is potential commercial as well as military applications, for the technology being developed, it is usually expected that some cost share should be offered.

Section 845 projects have supported dual-use technology developments. Industry's incentive to commercialize the technology serves as the rationale for cost sharing and reduced government oversight.

Section 845 Reporting Requirements

Annual reporting requirements include the following**: (1)** Circumstances justifying the use of the Section 845 authority, **(2)** Extent of cost sharing, **(3)** Contribution towards broadening of the technology and industrial base for both DOD as well as national security needs, **(4)** Payments received and credited, **(5)** Lessons learned on each prototype project, and **(6)** Technical objectives of the effort, including the technology areas in which the project was conducted.

Presently, legal authority under an 845 does not extend to production.

Intellectual Property

Intellectual property includes innovations, inventions, and other products of human creativity that are recognized and protected by the law. As the Government moves to participate more directly in the commercial marketplace, it is useful to understand the differences in the types of intellectual property protection.

Patents:

A patent provides an inventor the right to exclude others from using, making, or selling the invention for a specified period of time. It effectively creates a monopoly for its owner

during a specified period of time. There are four prerequisites to patentability that every piece of intellectual property must meet:

- **The intellectual property must meet the definition in 35 U.S.C § 100(a) of an invention or discovery.**
- **The intellectual property must be novel. The patentee must be the inventor and the invention must not have been known or used by others.**
- **The third prerequisite is utility. The invention must be capable of being beneficially used for the purpose for which it was designed.**
- **Finally, the invention cannot have been obvious to an ordinary person from prior inventions.**

Copyrights:

A copyright protects an author's expression in original works or, in other words, a copyright does not protect an idea but the expression of the idea. It gives the author the exclusive privilege to print, copy, publish, sell or license copies of the author's literary, artistic, or intellectual productions.

Trade Secrets:

This type of intellectual property is perhaps the least obvious and sometimes the most valuable to a company. It may include any information, including a formula, pattern, compilation, program, device, method, technique, or process that derives economic value from not being known or readily ascertainable by other persons. The formula for Coca-Cola is a good example of a trade secret.

Trademarks:

Trademark laws may protect any unique word, name, symbol, device or combination.

Intellectual Property Considerations for Section 845's

Many commercial companies have refused to do business with the Government in the past because they believed that they would be forced to give up their rights in their intellectual property under a traditional Government procurement contract.

One of the guiding principles behind "Other Transactions" and 845 Agreements is that the government is trying to act more like a commercial entity by incorporating commercial-like clauses and procedures, especially with intellectual property rights. While DARPA has been flexible and willing to negotiate lesser intellectual property rights in appropriate circumstances, it is not willing to forgo these rights in all instances without sufficient justification.

Each instance should be analyzed on a case-by-case basis and the Government technical personnel should be heavily involved in the negotiations to confirm that the Government is receiving the rights necessary for its purposes.

Any position *from unlimited rights to no rights is possible* and *permissible* as long as it is the best business decision for the government and can be backed up by the contractor's rationale and justification.

Some examples of intellectual property negotiation considerations:

- **The company may show that, in order for its commercialization plan to work, it needs to be assured of exclusivity for a designated period of time.**
- **The Government may postpone assumption of rights for a period of months or years to facilitate commercialization.**

In the final analysis, f*lexibility* will be the hallmark of future Government/industry R&D agreements. It is in the Government's best interest to understand, and when possible and appropriate, accommodate industry's concerns in protecting its intellectual property. Only in this way will the Government be able to tap into the billions of dollars worth of R&D and cutting edge technologies available in commercial companies that cannot or will not do business with the Government under the current regulatory circumstances.

Decision to Use an Other Transaction for a Prototype Project

Each program should be reviewed individually to determine what parameters should be established to successfully achieve the desired capability, while assuring a reasonable cost and on-time performance.
Focus is on the warfighter's goals and objectives rather than procurement regulations.
Consider for example:

(a) Will this attract business entities that do not normally do business with the government?
(b) Is this a business arrangement that is not conducive to a FAR contract?
(c) Are there specific FAR requirements that would not be accepted by a new defense business entity (e.g. cost accounting standards, intellectual property)?
(d) Are there specific FAR requirements that are inhibiting the integration of commercial and military procedures or processes and do we expect to be able to achieve integration by using an other transaction?
(e) Do we expect to acquire more affordable technology, reduce program costs, or improve schedule or performance by using an other transaction?
(f) Will the prototype project increase competition on follow-on efforts?
(g) Do we expect to be able to transition from the prototype project to a FAR 12 commercial item contract?
(h) If the follow-on effort is not expected to be a commercial item procurement, will we be able to continue the development or production with a FAR contract?

Comptroller General Access to 845 Records

Section 801 of the National Defense Authorization Act for Fiscal Year 2000 (P.L.106-65) states that the Comptroller General be permitted to have access to and the right to examine records directly pertaining to other transactions for prototype agreements.

All CMO agreements officers shall include a clause that provides access to records directly pertaining to these other transactions for prototype agreements in which the total government payments will exceed $ 5,000,000.

Tracking Success of the 845 Other Transaction Agreement

- **Consistent with the Under Secretary of Defense's Memorandums regarding 845 Other Transactions, the agreements officer and prototype project manager must document what is expected to be gained by using an other transaction and track whether the expected benefits were actually achieved.**

- **Metrics, which gauge key measures of merit and determine whether the expected benefits of using an other transaction were achieved, should be established prior to award.**

- **An annual report on the actual benefits and lessons learned for each prototype project must be submitted to OUSD (A&T) DDP by November 15th of each year.**

Termination of Prototype Agreements

When acquiring a prototype, it is generally not appropriate to permit the OT awardee to terminate unilaterally. However, when the OT awardee has made a substantial investment in the prototype project, it may be appropriate to provide the OT awardee the unilateral right to terminate.

Payment Considerations for Prototypes

The agreement needs to clearly identify the basis and procedures for payment. Consider the following in drafting the agreement payment provisions:

- **Are payments designed to track to expenditures?**

- **Are the payment amounts subject to adjustment during the period of performance?**

- **If the payment can be adjusted, what is the basis and process for adjustment?**

- **What are the conditions and procedures for final payment and agreement closeout?**

- **Is a final audit of costs needed?**

- **Generally, *the government should avoid making advance payments to the OT awardee.***

Price Reasonableness

The government must be able to determine that the amount of the agreement is fair and reasonable.

The agreement officer may require whatever data is *necessary* to establish price reasonableness, including commercial pricing data, parametric data, or cost information. If cost information is necessary, the government should be sensitive to the requested volume to prevent inundating the potential contractor not equipped with the necessary staff to handle such requests.

DCAA is available to provide financial advisory services to the agreements officer to help determine price fairness and reasonableness.

Allowable Costs Guidelines

The agreement should stipulate that federal funds and the OT awardee's cost sharing funds are to be used only for costs that:

- a reasonable and prudent person would incur in carrying out the prototype project, and

are consistent with the purposes stated in the governing Congressional authorizations and appropriations

Cost Sharing for Prototype Projects

Cost sharing *is not required statutorily for prototype projects*; however, if there are commercial or other benefits to the contractor involved in the project, then cost sharing may be appropriate. If cost sharing is determined to be appropriate, the amount of contractor cost sharing should be commensurate with the commercial applicability or other benefits to the contractor.

The cost of prior research should not be counted as private sector cost share. Only those *additional resources provided by the private sector and needed to carry out the prototype project* should be counted.

In most instances, the government's payments or financing should be representative of its cost share as the work progresses, rather than front loading government contributions.

Other transactions that require cost sharing should require financial reporting that provides appropriate visibility into expenditures of government funds and expenditures of private sector funds.

Other Transaction Agreement Terms and Conditions

10 U.S.C 2371, Section 845, as amended, provides for the flexibility to negotiate terms and conditions appropriate for the acquisition, without regard to the Federal Acquisition Regulation. Therefore, it is essential that legal counsel be kept closely involved in the development of the agreement 's terms and conditions. The agreement officer is responsible for incorporating appropriate terms and conditions for the particular prototype project. It is also the agreement officer's responsibility to ensure the other transaction incorporates good business sense and appropriate safeguards to protect the government's interest. This includes assuring that the cost is reasonable, the schedule and other requirements are enforceable, and the payment arrangements promote on-time performance.